

Ex. 5 - Deliberative Process

Sent from my mobile device - please pardon typos.

Begin forwarded message:

From: Steve Verburg <SVerburg@madison.com>
Date: October 20, 2016 at 7:01:07 PM CDT
To: "Cassell, Peter" <cassell.peter@epa.gov>
Subject: Re: deadline question about MI CWA authority

Pete,

That's very helpful. Can you also tell me about how federal tribal consultation requirements work, and what is different about that sort of consultation and the requested but not required consultation that has taken place with regard to Back Forty?

Can you share correspondence between EPA and MDEQ on Back Forty?

Thanks,
 Steve

Sent from my iPhone

On Oct 20, 2016, at 9:46 AM, Cassell, Peter
 <cassell.peter@epa.gov<<mailto:cassell.peter@epa.gov>>> wrote:

Steve – I broke out the answers for you below. The mine construction would be regulated through the Clean Water Act 404 program. Let me know if you have more questions.

Following up on our phone conversation, I'm interested in knowing if there are differences between Michigan's authority under CWA and Wisconsin's.

I'm writing about Aquila's Back Forty mining project in the U.P. I was told that the authority delegated to Michigan means EPA and ACOE are less involved in permitting the mine (compared to the way it has been done in Wisconsin)

- Michigan has authority to operate the federal Clean Water Act (CWA) Section 404 program regulating the discharge of dredge and fill material.

That means that for most waters in Michigan, the Michigan Department of Environmental Quality (MDEQ), rather than the U.S. Army Corps of Engineers, is the CWA Section 404 permitting authority except for areas within Indian country, where the U.S. Army Corps of Engineers retains permit issuing authority. Wisconsin has not assumed this authority and the U.S. Army Corps of Engineers remains the CWA 404 permitting authority within Wisconsin, including in Indian country.

- Because EPA oversees the operation of state CWA 404 programs, and has ability to object to state 404 permits, and to take enforcement actions for violation of state-issued CWA 404 permits, EPA is involved in Michigan's program. While the U.S. Army Corps of Engineers does not issue permits for most waters in Michigan, it does review and provide comments on State-proposed CWA 404 permits. Also, if EPA objects to a State-proposed CWA 404 permit, and the objections are not resolved, jurisdiction for issuing that permit then reverts to the U.S. Army Corps of Engineers.

and Michigan isn't obligated to consult with the Menomonee Indian Tribe of Wisconsin about sites that have cultural significance off-reservation on the mine site.

- The federal tribal consultation requirements apply to situations involving federal actions, and the issuance of a state permit does not trigger consultation. Nevertheless, EPA has noted the tribe's concerns regarding cultural resources and requested MDEQ coordinate with Michigan's State Historical Preservation Officer and Tribal archeologists to address these concerns, and MDEQ has notified EPA of its interactions with tribes, including the Menominee Indian Tribe of Wisconsin, during the Aquila Back Forty Mine permit process.

The way it was told to me was that only Michigan and N.J. have this particular authority under the act.

- That is correct. While other states have considered, or are considering assuming the CWA 404, currently only Michigan and New Jersey have assumed the program.

Any light you can shine will be much appreciated. I'm writing for the weekend and being asked to file by the end of the day tomorrow.

Thanks,

Steve Verburg

Reporter, Wisconsin State Journal

608.252.6118[

@St_Verburg

Pete Cassell
Press Officer
U.S. EPA Region 5
312-886-6234 (office)
312-859-9614 (cell)
cassell.peter@epa.gov<<mailto:cassell.peter@epa.gov>>